84-1243

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

SAMMIE J. RODGERS,
Petitioner

v.

FISHER BODY DIVISION,
GENERAL MOTORS CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
Parties to the Proceeding	2
Questions to be Presented	3
Index of Authorities	4
Statutory Provisions Involved	5
Petition for Writ of Certiorari	6
Opinions Below	7
Statement of Jurisdiction	7
Statement of the Facts	7
Statement of the Case	8
Reasons for Granting the Writ	10
Questions of Substantial Public Interest	13
Conclusion	14
Judgment of U.S. District Court	Appendix A
Opinion of U.S. District Court	Appendix B
Order of U.S. District Court	Appendix C
Order of U.S. Court of Appeals, 6th Circuit	Appendix D
Order Denying Rehearing *En Banc*	Appendix E
Order of U.S. Supreme Court Extending Time to File Petition for Writ of Certiorari	Appendix F

PARTIES TO THE PROCEEDING

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QUESTIONS PRESENTED

1. To what extent can an appellate court weigh the evidence of a case and set aside a jury verdict?

2. If the appellate court finds no error in the lower court's jury instructions regarding Punitive Damages, can it *sua sponte,* with no objective standard, set aside the jury's Punitive Damages award?

3. Can the appellate court, in the instant case, become an advocate for Defendant General Motors Corporation and raise the issue of "present day value" regarding the jury's award for compensatory damages, even though General Motors failed to raise the issue at the trial court level or at the appellate court level?

4. Can the appellate court, without objective standards take away a party's Constitutional Right pursuant to the Seventh Amendment, to be tried by a jury of his peers and make decisions that only the trier of fact is allowed to make, if the case is without error?

5. Was it Plain Error for the Trial Court's failure to give an instruction regarding "present day value," when the counsel for the parties failed to raise the issue?

6. Should the Appellate Court remand the case for a new trial on both the compensatory and punitive damages, or merely remit the compensatory damages to "present day value" or order a new trial on only the compensatory damages?

INDEX OF AUTHORITIES

Cases *Page*

1. *City of Cleveland v Peter Kiewit Sons' Co.,*
   624 F 2d 749(6th Cir. 1980) 9
2. *Hilliard v Williams,*
   516 F 2d 1344 (CA Tenn, 1975) *cert denied* 96 S Ct 805 11
3. *Smith v Wade,*
   103 S Ct 1625 (1983) 11
4. *Magnett v Pelletier,*
   488 F 2d 33 (CA Mass, 1973) 12
5. *Paton v LaPrade,*
   524 F 2d 862 (CA N.J., 1975) 12
6. *Zarcone v Perry,*
   572 F 2d 52 (CA NY, 1978) 12
7. *Busche v Burke,*
   649 F 2d 509, 519 (7th Cir. 1981)
   cert denied, 454 U.S. 897 12
8. *Seaton v Sky Realty Company, Inc.,*
   491 F 2d 634, 636 (7th Cir. 1974) 12

STATUTES

1. 42 USCS §1981 .....5, 7, 8
2. 28 USCS § 1254(1) 7
3. 42 USCS § 2000(e) 7, 8

STATUTORY PROVISION INVOLVED

42 USCS Sec. 1981 which provides in part as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . .

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v.

FISHER BODY DIVISION
GENERAL MOTORS CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Now comes Sammie J. Rodgers, by and through his attorney, Frances C. McIntyre, and prays that a Writ of Certiorari issue to review the Decision and Order of the United States Court of Appeals for the Sixth Circuit affirming the District Court's Judgment on liability and reversing on the issues of damages, and remanding the cause for trial solely on the issues of compensatory and punitive damages, entered on July 13, 1984.

OPINIONS BELOW

A Jury Verdict was rendered on March 18, 1982, finding for the Plaintiff $300,000.00 Compensatory Damages and $500,000.00 Punitive Damages in this Cause of Action which is a race discrimination case, in employment. A Judgment was entered by the United States District Court, Western District of Michigan on March 23, 1982. (See Appendix A).

Defendants filed Motions for Motions for Judgment Notwithstanding the Verdict (N.O.V.), and New Trial or in the Alternative, for Remittitur. The District Court denied all three motions in an Opinion entered on November 23, 1982. (See Appendix B), and Order entered November 24, 1982 (See Appendix C).

The District Court's judgment was affirmed by the United States Court of Appeals for the Sixth Circuit on the issue of liability, and reversed on the issue of damages. The cause was remanded for trial solely on the issues of compensatory and punitive damages. (See Appendix D).

A Rehearing *en banc* was denied the Defendant on October 5, 1984. (See Appendix E). An Order Extending Time to File Petition for Writ of Certiorari was granted Plaintiff to and including February 1, 1985. (See Appendix F).

STATEMENT OF JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

STATEMENT OF THE FACTS

This is a Civil Rights case brought under Title VII, Civil Rights Act of 1964, 42 USC Sec. 2000(e) and 42 USC Sec. 1981, Civil Rights Act of 1866.

The Plaintiff, SAMMIE J. RODGERS, is a 54-year-old Black man, who states Fisher Body Division, General Motors Corporation, at Lansing, Michigan induced Plaintiff to pull up stakes from his home in Benton Harbor, Michigan, by its affirmative action recruitment program, to accept a job as Plant Patrolman in Lansing, Michigan.

Plaintiff states that although he performed the job satisfactorily, Fisher Body laid him off and/or discharged him, immediately preceding his attaining probation status, although it retained four White plant patrolmen, who had less seniority than Plaintiff.

Furthermore, Plaintiff states Fisher Body reneged on its promise to have Plaintiff fill a permanent position as Plant Patrolman, and instead gave the position to a White Patrolman, who had less seniority and less experience for the job.

Plaintiff states Fisher Body set him up for trivial charges such as stealing candy fr n the canteen, reporting late to his post, and reporting a fire to the wrong authorities, as reasons for his disqualifications for the job, in comparison to the White Patrolman, who was given the permanent position of Plant Patrolman.

Plaintiff states he performed his job well and had a good work record with no absenteeism or tardiness. The Union after reviewing the matter, decided that Plaintiff had been treated unfairly by management and requested that Plaintiff be reinstated with back pay. Fisher Body denied the Union's request.

STATEMENT OF THE CASE

Plaintiff's employment discrimination case pursuant to 42 USC Sec. 1981 was tried on March 15, 1982 through March 18, 1982 at the United States District Court, Western District of Michigan, in Grand Rapids, Michigan by an all White jury.

Judge Benjamin F. Gibson presided, and at the end of the trial, before the jury deliberated, in Open Court, Judge Gibson made Plaintiff's Counsel decide whether she wanted to proceed with the 42 USC Sec. 2000(e) claim, due to the fact that Plaintiff had argued future damages, which he stated was inconsistent with the remedies of Sec. 2000(e), i.e., reinstatement and back pay. Plaintiff's Counsel, with the consent of Plaintiff, opted to proceed only as to the claim under 42 USC Sec. 1981.

The jury trial lasted three days, and on March 18, 1982, after approximately 3½ hours deliberation, the jury returned a verdict in favor of the Plaintiff in the amount of THREE HUNDRED THOUSAND ($300,000.00) DOLLARS Compensatory damages and FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS Punitive damages.

The jury was an alert, intelligent jury and exhibited not a glimmer of partiality in their demeanor, throughout the trial. In fact, at the conclusion of the trial, the Court complimented the jury as having been a very serious jury that paid attention to the witnesses and the issues in the case.

The Defendant moved for Judgment N.O.V., a New Trial, or in the Alternative a Remittur, stating that a) Plaintiff had failed to establish a *prima facie* case of intentional race discrimination; b) the trial Court had erred in its jury instruction regarding Punitive damages; c) the Punitive damages awarded by the jury were excessive as a matter of law; d) Plaintiff's Counsel prejudiced and inflamed the jury and e) the Court improperly allowed the jury to interpret provisions of the Collective Bargaining Agreement regarding seniority.

Oral argument on Defendant's post judgment motions were held in Open Court in July, 1982. After several months, on November 23, 1982, the Court rendered its Opinion (See Appendix A) and denied Defendant's Motions for Judgment N.O.V., New Trial or in the Alternative a Remittitur. The Court stated, in its opinion, the verdict was supported by the evidence and was not excessive. Furthermore, the Opinion stated that it did not find Plaintiff's comments to the jury to be prejudicial, and even if they had been, Defense Counsel had not made an objection at the time, in order to preserve the Record. The Court also stated in its Opinion, that Plaintiff's Counsel's comments as to the wealth of Defendant were in rebuttal to Defense Counsel's remarks that Plaintiff wanted to be a "millionaire" and a "wheel," and were not improper, even if they had not been made in rebuttal, as it is a relevant comment in a case seeking punitive damages, and as the Sixth Circuit has held in *City of Cleveland v Peter Kiewit Sons' Co.*, 624 F 2d 749 (6th Cir. 1980), ". . . the name General Motors is probably already synonymous among the general public with 'corporate giant,' so the remarks could not have added much information anyway."

On December 23, 1982 Defendant appealed, stating the Plaintiff had failed to establish a *prima facie* case based on "Over Acts or Patterns of Discrimination" and other issues, and the fact that the District Court erred in denying Defendant's Motion for Judgment N.O.V.

The United States Court of Appeals, Sixth Circuit, heard Oral Argument in November, 1983 and rendered a Decision and entered an Order on July 13, 1984, affirming the District Court's judgment on the issue of liability and reversing on the issues of damages and remanding the cause for trial solely on the issues of compensatory and punitive damages.

Although the Court of Appeals found, after carefully reviewing the record, that Plaintiff's Counsel's closing arguments to the jury were not inflammatory; that the trial court had not erred in its jury instruction regarding Punitive damages; that Plaintiff had not failed to establish a *prima facie* case of intentional race discrimination and that Defendant's claim of error regarding the Collective Bargaining Agreement was unwarranted, as it was Defendant who introduced the Agreement into evidence, not the Plaintiff, it still decided to remand the case for a new trial on both the compensatory and the punitive damages.

The Court of Appeals also stated the record of the trial is in large part free of preserved error, but stated in spite of the fact that Defendant had not raised the issue of "present day value" at the trial court nor at the Court of Appeals, the Court of Appeals, *sua sponte,* found the jury instruction on compensatory damages to be one of *plain error,* due to the fact that the damages were so excessive as to be "shocking to the conscience." Furthermore, the Court of Appeals held that Plaintiff's counsel's arguments as to Plaintiff's loss wages and future wages were extremely speculative, and that, coupled with the fact that neither Plaintiff or Defense Counsel, nor any instruction from the court raised the issue of "present day value" of the future damages, "probably" tainted the Punitive damages award.

The Court of Appeals found three errors (1) the failure of either party to request a charge and the failure of the District Court to charge the jury on reduction of the future damages to present value; (2) plaintiff's closing argument in which Plaintiff's counsel calculated on a blackboard plaintiff's damages for lost wages; (3) the limited evidence of mental distress.

REASONS FOR GRANTING THE WRIT

1. Plaintiff's Counsel did not speculate as to Plaintiff's

backpay and future pay differential, as Plaintiff testified as to his earnings at the time of trial, at his new job, and presented W-2 forms as evidence. That coupled with Jeff Bodary's testimony as to what his present wages were, including overtime, which Plaintiff would have earned had he been placed in the job, instead of Jeff Bodary, were not speculative, and even if they had been, had not been objected to by Defendant's counsel at the trial court level or at the Appeal Court level.

2. The award of some $220,000.00 in backpay and future pay were not so shocking to the conscience as to have the Court of Appeals Court, *sua sponte,* remand the case for a new trial on the damages, as it accurately represents from Plaintiff's testimony and W-2 forms the actual loss of back and future pay.

3. The Court of Appeals contradicted itself in remanding the case to be retried on the Punitive Damages, by stating the punitive damages were probably "tainted" by the fact that the parties had not argued present day value, as the Court of Appeals in case after case has held that punitive damages are to deter the wrongdoer and to punish him and has previously decided in case after case, that compensatory damages have no bearing on the amount of punitive damages. Thus, even if the Court of Appeals chose to remand for a new trial on the compensatory damages, it should not have also remanded for a new trial on the punitive damages, and in doing so has not only violated Plaintiff's rights to have the issue decided by a jury, but is giving Defendant several "bites of the apple," by in effect, giving in to its request for a new trial, as the Court knows, or should know, that a remand for a trial on the punitive damages, will resurrect all of the issues, and in effect grants Defendant's request for a new trial, although the Court affirms the judgment of liability. Here, the Court contradicts its previous decision in *Hilliard v Williams,* 516F 2d 1344 (CA Tenn, 1975) *cert denied* 96 S Ct 805, where it held that the award of punitive damages is a matter within the discretion of the trier of fact and the scope of appellate review is accordingly narrow. Also, the Supreme Court in *Smith v Wade,* 103 S Ct 1625 (1983) has held that punitive damages are not measured by the amount of compensatory damages, but are awarded to punish the wrongdoer, and to deter him from future wrongdoing. In the instant case Plaintiff asked for $500,000.00 and got it and there isn't any

evidence in the case that the lack of arguing present day value and the size of the compensatory award tainted the jury's award of punitive damages. If the Court of Appeals found that the trial court's Jury Instruction regarding Punitive Damages was appropriate, and that Jury Instruction said that punitive damages need not be affected by the amount of compensatory damages, how could the Court of Appeals supplant the Jury's decision with its own?

4. The Court of Appeals decision on the amount of a speculated $80,000.00 as being excessive for emotional distress, in the instant case, is in direct contradiction with other circuits which have held, in civil rights actions a Plaintiff who proves only an intangible loss of Civil Rights or purely mental suffering may be awarded substantial compensatory damages. Surely, in the instant case, it does not take an outside observer, besides testimony from Plaintiff, that he had always been an upstanding citizen, commended by President Nixon and President Gerald Ford for his service on the local Draft Board, suffered emotionally when he and his wife and child had to go on welfare, for the first time in his life. Surely, this meets the test of humiliation, and is per se emotionally distressing for a man of Plaintiff's caliber. The standard is subjective. (See *Magnett v Pelletier,* 488 F 2d 33 (CA Mass, 1973); *Paton v LaPrade,* 524 F 2d 862 (CA N.J., 1975); *Zarcone v Perry,* 572 F 2d 52 (CA NY, 1978) and *Busche v Burkee,* 649 F 2d 509, 519 (7th Cir. 1981), *cert denied,* 454 U.S. 897. In *Seaton v Sky Realty Company, Inc.,* 491 F 2d 634, 636 (7th Cir, 1974), the Court said, "Humiliation can be inferred from the circumstances ... (Plaintiff) was subjected to a racial indignity which is one of the relics of slavery which (42 USC Sec. 1981) was enacted to eradicate."

5. Finally, even if the Supreme Court upholds the Court of Appeals decision to remand on the damages because of the failure of counsel to argue present value (although this is a spurious issue as it would be set off by inflation vs interest), the Court of Appeals could easily remand for the trial court to remit the amount of the jury's award of $300,000.00 to reflect present day value, and not endanger the Plaintiff's right to a jury trial, by remanding for a new trial on both compensatory and punitive damages.

QUESTIONS OF SUBSTANTIAL INTEREST TO THE PUBLIC

1. This Court needs to settle once and for all to what extent the Court of Appeals can weigh the evidence and set aside a verdict, because it believes other results are more reasonable, especially when the opposing party has failed to preserve error by timely objection.

2. This Court needs to settle once and for all to what extent the Court of Appeals can *sua sponte,* and with a subjective standard, find plain error due to the fact that it believes the verdict of a jury was so excessive as to shock the conscience, without stating in what way the verdict was excessive, by how much it was excessive or in what objective way does it shock the conscience, when the evidence is to the contrary. In the instant case the verdict for the compensatory damages was not shocking as it closely approximated Plaintiff's actual losses in back and future pay, and even if the emotional damages were assessed by the jury at some $80,000.00, that's a subjective standard and not one for the Court of Appeals to decide. This is not a personal injury case.

Even more so the Court of Appeals should not tamper with the jury's Punitive Damages award, unless it finds that the Jury instruction or some other error was committed by the trial court regarding said damages. In its opinion the Court of Appeals contradicts itself by finding no error in the record regarding punitive damages, but nevertheless remanding for a new trial on the Punitive Damages, because it believes the Jury's award of said damages might have been tainted by the fact that present day value was not argued in the compensatory damages. This in spite of the fact by its own previous decisions and other courts as well as the Supreme Court, Punitive damages are not to be measured by Compensatory damages, and the instruction in the instant case indeed stated that fact.

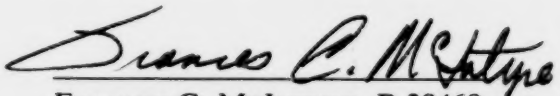
3. This Court needs to settle once and for all if Appellate Courts can without objective standards take away a party's Constitutional right, under the Seventh Amendment, to be tried by a jury of his peers and make decisions that only the trier of fact is allowed to make, if the case is without error.

These questions justify the grant of certiorari to review the judgment below.

CONCLUSION

The Right of a Trial by Jury is a fundamental right pursuant to the Seventh Amendment of The U.S. Constitution and an Appellate Court should not be allowed to become the "trier of fact" without objective standards. For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,



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DATED: January 17, 1985

APPENDIX "A"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMMIE J. RODGERS,

Plaintiff,

v File No. G79-514 CA

FISHER BODY DIVISION,
GENERAL MOTORS CORPORATION,

Defendant.

JUDGMENT

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 23rd day of March, 1982.

Present: HONORABLE BENJAMIN F. GIBSON,
District Judge

This cause, having been brought to be heard upon the Complaint filed herein, and proofs having been taken in open Court before a Jury and the Jury having unanimously found in favor of the Plaintiff, SAMMIE J. RODGERS, and the Jury having assessed compensatory damages at THREE HUNDRED THOUSAND ($300,000.00) DOLLARS and the Jury having assessed FIVE

HUNDRED THOUSAND ($500,000.00) DOLLARS in punitive damages;

IT IS ORDERED AND ADJUDGED, that the Defendant, General Motors Corporation pay the sum of EIGHT HUNDRED THOUSAND ($800,000.00) DOLLARS to the Plaintiff, SAMMIE J. RODGERS plus interest, costs and attorney fees.

IT IS SO ORDERED.

BENJAMIN F. GIBSON
U.S. District Judge

APPENDIX "B"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMMIE J. RODGERS,

Plaintiff,

v File No. G79-514 CA

FISHER BODY DIVISION,
GENERAL MOTORS CORPORATION,

Defendant.

OPINION

This is an employment discrimination action pursuant to 42 U.S.C. §1981. Plaintiff alleged that he was a victim of intentional racial discrimination because he was separated from his employment as a temporary plant security guard while another was offered a permanent guard position. After four days of trial a jury awarded plaintiff $300,000 as compensatory damages and $500,000 as punitive damages. Presently before the Court are defendant's motion for judgment notwithstanding the verdict (judgment n.o.v.) and motion for new trial or in the alternative, for remittitur.

Defendant contends that the award of punitive damages is unsupported by the evidence and excessive, and that the verdict is against the weight of the evidence. It also argues that the Court erred in all its instruction on punitive damages, that the jury was improperly allowed to interpret the collective bargaining agree-

ment, and that the verdict was in part caused by improper and prejudicial closing argument.

The preferred formulation of the standard for deciding a motion for judgment n.o.v. is that it should be granted only when reasonable minds could not differ that the conclusions to be drawn from the evidence should be in favor of the moving party. On the other hand, a judgment n.o.v. should be denied where there is sufficient evidence to raise a question of fact for the jury. *Morelock v. NCR Corp.*, 586 F. 2d 1096 (6th Cir. 1978) *cert. denied,* 441 U.S. 906 (1979). The *Morelock* court stated further:

> In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor.

586 F.2d at 1104. *Accord, Hildebrand v. Board of Trustees of Michigan State University,* 662 F.2d 439 (6th Cir. 1981), *cert. denied,* ____ U.S. ____, 102 S.Ct. 1760 (1982).

In contrast to testing the legal sufficiency of the evidence in a motion for judgment n.o.v., a motion for new trial "is confined almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). A new trial may be granted where the verdict rendered is contrary to the clear weight of the evidence, or excessive, or to prevent a miscarriage of justice. *Peacock v. Board of Regents,* 597 F.2d 163 (9th Cir. 1979). A new trial would also be warranted when a verdict is reached on account of bias, passion, prejudice, corruption or other improper motive. *King v. Ford Motor Co.*, 597 F.2d 436 (5th Cir. 1979). However, a trial court does not properly grant a new trial merely because it might have come to a result different from that reached by the jury. *Rios v. Empresa Lineas Maritimas Argentinas,* 575 F.2d 986 (1st Cir. 1978).

In the exercise of its discretion the trial court may condition an order for a new trial upon the failure of the plaintiff to remit a portion of the award which the court deems excessive. *See Burnett v. Coleman Co.*, 507 F.2d 726 (6th Cir. 1974). Such remittitur requires the trial judge to exercise a mature, judicial discretion in

viewing the verdict in the light of the whole setting of the trial, the character of the evidence, and the complexity or simplicity of the legal and factual issues; and his discretion should be exercised to nullify a seriously erroneous result and to prevent a miscarriage of justice. 6A Moore's Federal Practice ¶ 59.05[3] (2d ed. 1982). An abuse of discretion in granting remittitur will be found only where the quantum of damages found by the jury was clearly within the maximum limit of a reasonable range. *Smith v. John Swafford Furniture Co., Inc.*, 614 F.2d 552 (6th Cir. 1980).

Thus, the motions before the Court require careful scrutiny of the entire record. The evidence at trial established that plaintiff was a well-qualified candidate for a position as plant security guard. He had some military experience and two years of specialized training in scientific crime detection as well as three years' experience as a security guard in a shopping center. Although it was unusual for plant patrolmen to have any education beyond high school, plaintiff had completed a master's degree. The chief of security recorded among his interview conclusions that plaintiff "seems very capable" and "would probably make a very good employ."

Plaintiff was one of several temporary guards to be hired as vacation replacements. He was told from the start that he would be in the running for a permanent position which was expected to open up during his period of temporary employment. Plaintiff was very interested in a permanent position and was quite conscious of performing his job well—he avoided absenteeism and tardiness, and never refused a request for overtime work, working in 5½ months a total of 272 hours over and above the regular 48-hour work week.

On June 21, 1977, several days after plaintiff was hired, Jeffrey Bodary, a white man who eventually received the permanent position, was also hired as a temporary guard. He too was considered well-qualified, with some college training in law enforcement, and was hoping for a permanent position as well.

Mr. Bodary received two full weeks of training, while plaintiff was trained for only three or four days. There was testimony which suggested that Mr. Bodary received some coaching from his superiors about how to make himself look good as a candidate for

the permanent position, whereas plaintiff did not receive such coaching.

A notation appears on Mr. Bodary's personnel record as follows: "Starting 9-5-77 will replace O. Kent who retired." September 5 was less than halfway through the six-month probationary period which plaintiff was told would be the basis of the decision about the permanent position. At trial, no one from General Motors was able to identify the source of this notation or explain it with anything more than conjecture.

In October and November, plaintiff was "written up" on an Officer's Special Report on several occasions. Plaintiff had credible explanations for each and every one of these incidents. One report involved late relief at a post by plaintiff as part of a relay system. Plaintiff explained that there had been a mix-up over the location of the field glasses, and that, pursuant to common practice, he had stopped at the infirmary for some cold relief medication. There was testimony that late relief was not uncommon, and that no one had ever been written up for late relief before.

A second incident involved plaintiff crossing a trainwell by climbing on a boxcar in an area where signs warned pedestrians not to do so. Plaintiff testified that there were other areas in the plant where warning signs were not considered applicable to patrolmen, that no one ever told him this one was any different, and that he had done so in an effort to comply with two urgent directions from a foreman and the dispatcher.

A third incident involved an alleged failure to follow appropriate fire reporting procedures or give the correct location. However, there was testimony that plaintiff reported the location as it was told to him, and that plant firemen could not be notified because they were not on duty at the time.

A final incident involved an accusation of stealing candy from the company canteen. The accusation was based on the presence of plaintiff's logbook in the canteen, but plaintiff explained to Chief Rosen's satisfaction that plaintiff had unlocked the canteen for an authorized employee and had mistakenly left the logbook there in the process of doing so.

In late November, plaintiff was called into a meeting with Chief Rosen and others. These previous incidents were discussed, and plaintiff was told that Jeff Bodary had been selected for the per-

manent position and that plaintiff would be laid off. Plaintiff repeatedly asked for union representation at this meeting but was denied. Plaintiff testified that Chief Rosen put his arm around plaintiff's shoulders and stated, "You don't think there's anything racial involved in this incident, to [sic] you."

Following his separation from employment, plaintiff filed a grievance which the union pursued through several steps. It was contended, among other things, that since plaintiff was hired before Mr. Bodary, and they were both qualified for the permanent position, plaintiff should have been offered it by virtue of his seniority. Mr. Bodary testified that that had been his understanding. The plant management contended that plaintiff had no seniority rights as a temporary employee under the national collective bargaining agreement.

Plaintiff attempted to transfer to another G.M. facility which had openings. He was told that he could not be hired because the Fisher Body plant at which he had worked was giving him a bad reputation. Plaintiff's union representative, Lyle McFadden, testified that at a meeting with Chief Rosen they discussed whether plaintiff had been "disciplined" or laid off:

> So, I turned to him and I said okay, if Sammie Rodgers was laid off, everybody else that's been laid off at Fisher Body put in an application at Olds, they are hiring, why can't he go over there and be hired. Rosen then turned and laughed and said I wouldn't do that to Husby, Chief Husby at Oldsmobile. And so, I said, so you are telling me a story then that there is something that you are not telling me. There is something, there is more to his layoff than just the layoff. And, he said he was not free at that time to discuss it with me, what it was.

Plaintiff also was initially refused unemployment compensation because defendant reported that plaintiff had been fired rather than laid off.

The evidence established that generally minorities in plant security at the plant were proportionately well-represented, but not at the upper levels. Chief Rosen indicated that he had once offered to promote a black patrolman to sergeant, but the officer declined. Jeff Bodary testified that he doesn't believe that blacks

in the department are more lazy and poorer officers than whites, but had the following to say about four of the five black plant patrolmen: "I don't think that—this is going to sound bad, but I believe that I have seen them lazy, slow, disinterested, sleeping, I don't recall ever writing special reports, just poor officers in general."

Plaintiff's theory of the case was that there was a concerted effort or conspiracy to deny him the permanent position in favor of Jeff Bodary on the basis of race. He argued that the late relief incident in particular appeared to be a "set-up." Defendant's theory was that it simply exercised its right to choose among qualified candidates, and there was no racial motivation involved. The jury clearly determined that the evidence demonstrated intentional discrimination which was malicious, willful, or at least recklessly indifferent to plaintiff's rights.

The Court has carefully reviewed the record, including but not limited to the evidence highlighted above. The Court has also reviewed the post-trial briefs of counsel and has heard oral argument on the post trial motions. The Court is of the opinion based on the entire record that there was clearly sufficient evidence of discrimination to raise a question of fact for the jury, and that reasonable minds could differ as to the conclusions to be drawn from the evidence. Accordingly, the motion for judgment n.o.v. is denied.

Among the arguments raised in support of a request for new trial is that the verdict is against the weight of the evidence. Based on the same considerations, the Court finds that this is not a case where the verdict is so clearly against the weight of the evidence that a new trial is warranted.

Defendant contends that the verdict is excessive, in particular with respect to the awards for mental distress and punitive damages. Plaintiff requested some $220,00 for lost wages, past and future, so some portion of the $300,000 in compensatory damages appears to be for mental pain and suffering. The primary evidence in this regard was plaintiff's testimony concerning the humiliation he suffered from having to go on welfare after he was "laid off" but unable to receive unemployment compensation. The Court is reluctant to disagree with the jury's valuation of this very individualized experience. A determination of the proper

compensation for a deprivation of one's civil rights is, by its nature, highly subjective. *Busche v. Burkee*, 649 F.2d 509, 519 (7th Cir. 1981), *cert. denied*, 454 U.S. 897.

In this case the record indicates that plaintiff was a hard-working model citizen. His resume discloses a lengthy employment history including several positions with significant elements of contribution to the community in the field of education and as a probation officer. He also appears to have been active in voluntary public service, having received certificates of appreciation from two United States presidents. He had never been on welfare before, and had a wife and child to support. He testified that the welfare payments weren't really enough to sustain his family and himself, and that his car was repossessed during this time. Knowing that defendant had given him "a bad reputation" when he applied for a job at Oldsmobile, he may have wondered if such reports would prevent him from ever working again.

In addition to such testimony, "[H]umiliation can be inferred from the circumstances.... [Plaintiff] was subjected to a racial indignity which is one of the relics of slavery which [42 U.S.C. § 1981] was enacted to eradicate." *Seaton v. Sky Realty Company, Inc.*, 491 F.2d 634, 636 (7th Cir. 1974). *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). This Court is unwilling to conclude that the jury overvalued the mental distress suffered by a person of plaintiff's background and circumstances over a period of seven months, and therefore finds that the compensatory damages award was within the maximum limit of a reasonable range.

The $500,000 award for punitive damages is also challenged by defendant. It is argued that the Court erred in its instruction on punitive damages. The Court charged the jury as follows:

> The Plaintiff also claims that the acts of the Defendant were done with malice or with callous and reckless indifference to Plaintiff's rights so as to entitle him to an award of punitive damages in addition to compensatory damages, or in addition to nominal damages, such as you find.
>
> If you find for the Plaintiff, and if you further find that the Defendant did act with malice, or with callous and reckless indifference to the rights of others, the law would allow you,

in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages. Any award of punitive damages must be separately stated in your verdict.

This instruction was based on the Fifth Circuit's Pattern Jury Instructions, Damages Instructions No. 8, with modifications. The Court is of the opinion that the instruction given clearly, adequately, and succinctly informs the jury of: 1) the standard of conduct which justifies an award of punitive damages, 2) their discretion in assessing an amount, if any, 3) the purposes of such an award, and 4) their ability to consider the financial resources of the defendant. The Court disagrees with defendant that the jury needed definitions of "malice" and "callous or reckless indifference to the rights of others." The Court feels it is clear from the instruction that punitive damages are only awarded in exceptional circumstances where behavior of such character is present, so that punitive damages need not be specifically labelled "extraordinary." An instruction that "punitive damages are disfavored by the law," as requested by defendant, would add nothing to understanding and perhaps inject confusion—punitive damages are warranted in certain circumstances and not in others; they are not always "disfavored." Finally, the fact that damages should be awarded "with calm discretion" was apparent from the instructions taken as a whole. Thus, the Court concludes that a new trial is not warranted on the basis of the jury instruction on punitive damages.

It is also argued that there was no evidence to support an award of punitive damages. However, it appears that the jury accepted plaintiff's theory of a deliberate conspiracy and set-up, for which there was some evidence. It clearly then could find that in addition to bare intentional discrimination that there was malice, or callous and reckless indifference to plaintiff's rights. Once it decided that punitive damages should be assessed to punish defendant and deter others, the jury could properly consider, as plaintiff argued, the multibillion-dollar financial resources of defendant. *See Fountila v. Carter,* 571 F.2d 487, 492 (9th Cir. 1978) (wealth of defen-

dant an important factor for jury to consider in awarding punitive damages); D. Dobbs, Remedies § 3.9, pp. 218-19 (1973). The size of an award which is necessary to make General Motors Corporation take steps to discharge its legal responsibilities, rather than be regarded as an inconvenient cost of doing business, is clearly a judgment call. Defendant had the burden and opportunity to show that a more modest amount would have been sufficient to achieve the purpose of punitive damages. *See Zarcone v. Perry,* 572 F.2d 52, 56 (2d Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979). While this Court might not have reached the same result, it cannot say that the jury determined an award of punitive damages which is clearly outside the maximum limit of a reasonable range for the defendant in this case.

Two remaining arguments of the defendant will be given brief attention. The first is that the jury was improperly allowed to interpret the collective bargaining agreement. The evidence showed that the local union disputed defendant's claim that the union contract provided no seniority for temporary security officers. It is settled that "the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. 574, 581-82 (1960). Since there was a conflict in the evidence concerning the collective bargaining agreement as supplemented by local past practice, the issue was a proper one for the jury to resolve. In addition, it should be noted that defendant never requested this Court to interpret the collective bargaining agreement as a matter of law; it simply requested an erroneously sweeping jury instruction that "an employer is not required by law to base its employment decisions on an applicant's length of service."

Defendant's final argument is that plaintiff's counsel's closing argument was improper and prejudicial in that she stressed defendant's size and wealth, urged her personal opinions upon the jury, and allegedly implied that opposing counsel had suborned perjury. Defendant refers the Court to the cases of *City of Cleveland v. Peter Kiewit Sons' Co.,* 624 F.2d 749 (6th Cir. 1980), and *Draper v. Airco, Inc.,* 580 F.2d 91 (3rd Cir. 1978). In *Kiewit* plaintiff's counsel improperly strove to inform the jury of defendant's wealth "at every opportunity," and he improperly brought up the

subject of insurance coverage "pointedly, unambiguously, repeatedly, and deliberately" despite constant objections by opposing counsel and recurrent reprimands from the trial judge. The Court observed that "the improprieties permeated the entire trial, from opening statement through closing argument, in 'a continuing pattern of misconduct.' " 624 F.2d at 758. In *Draper,* plaintiff's counsel committed the following improprieties:

> (1) he attempted to prejudice the jurors through repeated inappropriate references to the defendants' wealth; (2) he asserted his personal opinion of the justness of his client's cause; (3) he prejudicially referred to facts not in evidence; and (4) without provocation or basis in fact, he made several prejudicial, vituperative and insulting references to opposing counsel.

580 F.2d at 91.

This case does not approach the "flagrant misconduct" described in the above cases. Neither of them involved a claim for punitive damages. Thus, argument concerning defendant's size and wealth which was prejudicial in those cases was legitimate and relevant in this case. The remarks which defendant complains of were made in rebuttal to an accusation that plaintiff wanted to be a "millionaire" and a "wheel." Moreover, as the Sixth Circuit noted in *Kiewit,* the name General Motors is probably already synonymous among the general public with "corporate giant," so the remarks could not have added much information anyway. Other distinctions between this case and the two cited by defendant are that defendant never objected to plaintiff's counsel's closing argument until now, and that the remarks complained of were isolated.

In considering "the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g. whether it is a close case), and the verdict itself," *Kiewit,* 624 F.2d at 756, this Court finds that any improper comments were not so prejudicial as to require a retrial.

The Court concludes that the verdict is supported by the evidence and is not excessive, and that neither a new trial nor

remittitur should be granted. As the Sixth Circuit stated in upholding an award of compensatory and punitive damages in a § 1983 action for an unlawful beating by police, "Under these circumstances this Court will not invade the particular province of the jury in evaluating the value of plaintiff's civil rights."

BENJAMIN F. GIBSON
U.S. District Judge

Dated: November 23, 1982

APPENDIX "C"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMMIE J. RODGERS,
Plaintiff,

v

File No. G79-514 CA

FISHER BODY DIVISION,
GENERAL MOTORS CORPORATION,
Defendant.

ORDER

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 23rd day of March, 1982.

Present: HONORABLE BENJAMIN F. GIBSON,
District Judge

In accordance with the Opinion dated November 23, 1982, IT IS HEREBY ORDERED that defendant's motion for judgment n.o.v. and motion for new trial are denied.

IT IS SO ORDERED.

BENJAMIN F. GIBSON
U.S. District Judge

APPENDIX "D"

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-1022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMMIE J. RODGERS,
Plaintiff-Appellee,

v.

FISHER BODY DIVISION,
GENERAL MOTORS CORPORATION,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed July 13, 1984

Before: MERRITT and CONTIE, Circuit Judges; and POTTER, District Judge.*

POTTER, District Judge. Defendant Fisher Body Division, General Motors Corporation (General Motors), appeals from a judgment entered in an employment discrimination suit. Suit was brought under 42 U.S.C. § 1981 and 42 U.S.C. §2000e-5(f) *et seq.*, Title VII of the Civil Rights Act of 1964. Plaintiff waived his Title VII claims at the close of the case. The plaintiff, Sammie J. Rodgers, a black man, asserted that

* The Honorable John W. Potter, United States District Court for the Northern District of Ohio, sitting by designation.

General Motors intentionally discriminated against him because of his race. The jury awarded plaintiff $300,000 compensatory and $500,000 punitive damages.

In this appeal the Court confronts a record which is in large part free of preserved error. The record reveals, however, that the amount of compensatory damages awarded, when measured against the evidence of plaintiff's harm which was presented at trial, is clearly excessive. The excessiveness of the compensatory award calls into question whether the punitive damages award was properly determined. This is not a case in which an excessive verdict resulted from jury passion and prejudice. Rather, it is a case where the jury, having been provided inadequate guidance, lost its way in its attempt to determine just and reasonable damages awards.

The Court has considered the claims of error raised by the defendant. Because of its concern with the size of the verdict, the Court also, *sua sponte*, has considered errors which were not preserved at trial and which General Motors has not raised on appeal. The Court finds this to be "one of those uncommon occasions when unpreserved trial court error would result in grave injustice if allowed to stand." *Grice* v. *J. Ray McDermott and Co., Inc.*, 465 F.2d 486, 488 (5th Cir. 1972). Therefore, for the reasons hereinafter stated, the Court will order that the cause be remanded for new trial solely on the issues of compensatory and punitive damages.

The facts out of which this suit arose can be summarized as follows. The plaintiff was hired by defendant as one of several temporary guards at the Lansing Fisher Body plant. When hired, he was told that a permanent plant guard position would soon open and that he would be considered for it if he successfully passed a six month probationary period. He was also told that he would be competing with a white employee for the position. Approximately five months after beginning work, Mr. Rodgers was called to a meeting with the chief of security at the Lansing plant. Also at this meeting were the supervisor of salaried personnel and two sergeants

of the Lansing plant security force. At the meeting defendant's agents alleged four incidents of work-related misconduct by plaintiff. Although he offered reasonable explanations for each of the four incidents, Mr. Rodgers was told that he was being laid off. He was also told that Jeffrey Bodary, a white temporary plant guard, had been given the permanent plant guard position for which plaintiff had competed.

Evidence at trial indicated that both plaintiff and Mr. Bodary met and exceeded the rather minimal qualifications for the position. There was also evidence that Mr. Bodary was given more training than plaintiff and that he had been given informal coaching by his superiors.

In this appeal, the defendant presented four issues in its initial appellate brief and five issues in its reply brief. These can be summarized as follows: (1) whether plaintiff established a prima facie case of discriminatory treatment under either 42 U.S.C. § 1981 or Title VII; (2) whether plaintiff's counsel made improper inflammatory remarks during closing arguments; (3) whether the District Court erred in, "instructing the jury that they could decide whether defendant breached the collective bargaining contract where the issue of breach had already been decided adversely to plaintiff in the contract's exclusive grievance procedure"; (4) whether the District Court erred in ruling that an employer may be held vicariously liable for punitive damages of $500,000 for the actions of its relatively low level supervisors; (5) whether the damages awarded are excessive. In its arguments regarding excessive damages, defendant focused upon the lack of significant evidence of mental distress and upon claimed error related to the punitive damages award. For the reasons stated below, the Court finds no merit in defendant's first four claims of error. Regarding the fifth claim, although the Court agrees that damages are excessive, the reasons for the Court's finding of excessiveness are, for the most part, different from those which defendant has asserted.

Defendant, in asserting that plaintiff did not establish a prima facie case, stated that plaintiff had not shown systematic discrimination against minorities, an environment of discrimination, or a history of discrimination at the Lansing plant. However, because this is a disparate treatment rather than a disparate impact case, such proof is not required. Plaintiff met his burden of establishing the prima facie case as first articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

The Court, having carefully reviewed the trial transcript, finds that the closing arguments of plaintiff's counsel were not inflammatory. Her comments about the size and wealth of General Motors were made in rebuttal of statements made in closing arguments by General Motors' counsel. Also, these remarks were relevant and proper because plaintiff sought punitive damages.

Regarding the claimed error related to the collective bargaining agreement, it is noted that defendant, not plaintiff, introduced a copy of the agreement into evidence. The district court's instruction as to the agreement was as follows: "If you find that a collective bargaining agreement was violated with respect to length of service, you are instructed that Defendant is liable for such violation but only if you also find that the violation was intentional discrimination against Plaintiff based on his Race."

The Supreme Court has recently held that prior arbitration decisions brought pursuant to the terms of a collective bargaining agreement are not to be given preclusive effect in subsequent actions under 42 U.S.C. § 1983. *McDonald* v. *City of West Branch, Michigan*, 52 U.S.L.W. 4457 (U.S. April 18, 1984). The rationale for the Supreme Court's ruling applies equally in suits, such as this one, brought under 42 U.S.C. § 1981.

The district court restricted consideration by the jury of the alleged violation only if it was, "intentional discrimination

against the plaintiff based on his race." Furthermore, the instruction, if erroneous, was harmless error.

Defendant's argument that it is improper to impose punitive damages on General Motors for the misconduct of its relatively low-level supervisory employees is not persuasive. The chief of security at the Lansing plant was acting within the scope of his authority when he laid off plaintiff. The supervisor of salaried personnel was also present at the meeting at which plaintiff was told that he would be laid off. General Motors had authorized the actions of these individuals and is thus liable for their behavior.

The Court now considers the troubling issue of the excessiveness of the verdict. All the federal circuits today agree that there should be appellate supervision of the size of jury verdicts. 6A Moore's Federal Practice ¶ 59.08[6] (2d ed. 1981). In determining whether a verdict is so excessive that appellate review is proper, the Court must find the verdict to be "shocking" or to manifest "plain injustice." *Bauer* v. *Norris*, 713 F.2d 408 (8th Cir. 1983); *Zarcone* v. *Perry*, 572 F.2d 52 (2nd Cir. 1978); *Williams* v. *Steuart Motor Co.*, 494 F.2d 1074 (D.C. Cir. 1974). Before an appellate court reverses on the basis of excessive damages, it must make a detailed appraisal of the evidence bearing on damages. *Gruenthal* v. *Long Island R. Co.*, 393 U.S. 156 (1968).

The Court has made this appraisal, as stated above, and finds both the compensatory and punitive damages awarded in this case to be so excessive as to shock the conscience of the Court. These awards resulted from several errors which prevented the jury from receiving adequate guidance on the damages issues.

Errors which affected the compensatory damages award include: (1) the failure of either party to request a charge and the failure of the District Court to charge the jury on reduction of future damages to present value; (2) plaintiff's closing argument in which plaintiff's counsel calculated on a

blackboard plaintiff's damages for lost wages; (3) the limited evidence of mental distress.

The Court *sua sponte* raises the first two of these three issues.

It is settled law in this Circuit that an award of future damages must be reduced to present value in order to take into account the earning power of the money. *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U.S. 485 (1916); *Petition of United States Steel Corp.*, 436 F.2d 1256, 1280 (6th Cir. 1970), *cert. denied sub nom. Lamp* v. *U. S. Steel Corp.*, 402 U.S. 987, *rehearing denied* 403 U.S. 924 and 403 U.S. 940 (1971), appeal after remand 479 F.2d 489, *cert. denied* 414 U.S. 859 (1973).

The proposed jury instructions of neither defendant nor plaintiff included a charge which stated that an award of future damages must be reduced to present value. Neither plaintiff nor defendant objected to the court's instructions on compensatory damages. Ordinarily, such failure means that a reviewing court will not consider the error below. Fed.R.Civ.P. 51; 5A Moore's Federal Practice ¶ 51.03-.04. Defendant has not raised this issue on appeal. The Court, however, has discretion to consider these erroneous instructions regarding compensatory damages if it finds the instructions to have been "plain error." *Grice* v. *J. Ray McDermott and Co., Inc.*, 465 F.2d 486 (5th Cir. 1972); Fed.R.Ev. 103(d), 10 Moore's Federal Practice § 103.41. In *O'Brien* v. *Willys Motors, Inc.*, 385 F.2d 163 (6th Cir. 1967), this Court quoted with approval a statement by the Supreme Court concerning when such appellate review is proper: "In exceptional circumstances, . . . appellate courts, in the public interest may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). The error in question here was obvious and it affected the fairness and integrity of the judicial process

in that it was undoubtedly to some degree responsible for a shockingly large verdict. When an appellate court determines that the jury did not have before it a correct statement of the law regarding damages, it can remand solely for a redetermination of damages. *Crador* v. *Boh Brothers, Inc.*, 473 F.2d 1040 (5th Cir. 1973); *cf. Grimm* v. *Leinart*, 705 F.2d 179 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1415 (1984).

Not only did defendant not request a charge that future damages must be reduced to present value, but General Motors also failed to object to plaintiff's extremely speculative estimate of his damages for lost wages. In her closing argument, plaintiff's counsel, using a chalkboard, calculated these damages to be $220,770. She first estimated the amount plaintiff would have received had he continued working in the plant guard position during the seven month period between the date defendant laid him off and the date when he began his present job. She then calculated his "lost pay" from the date he began his present job until the time of trial.

She did this by determining the difference between plaintiff's actual salary and the salary, including overtime, which Mr. Bodary, the successful candidate for the permanent plant guard position, testified that he has received annually during the same years. She next added "15 percent at least" for fringe benefits and a figure for interest. She then suggested that "future interest" would have to be projected for 13 years, until the time of plaintiff's retirement at age 65. Apparently, plaintiff's counsel meant future income based on the difference between plaintiff's General Motors income and the income he might receive for the next 13 years from his present employer. The $220,770 figure thus includes future damages which were not reduced to present value. For a critical comment on this procedure, see *Ballantine* v. *Central R.R. of New Jersey*, 460 F.2d 540 (3rd Cir.), *cert. denied* 409 U.S. 879 (1972). It is apparent that plaintiff's counsel's chalkboard calculations had an effect on the jury. During its deliberations the jury requested "the blackboard with the figures for compensatory

damages." The court denied this request, stating that the blackboard and the figures thereon were not evidence in the case. It was plain error for the court not to instruct on reducing future damages (loss of income) to present value.

Furthermore, in the case of an injury of an economic nature, the injured party is to be placed, as nearly as possible, in the position he would have been in had the wrong not occurred. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). The amount of damages necessary to compensate a plaintiff for the deprivation of his constitutional rights is a question of fact and therefore should not be reversed on appeal unless the lower court's determination is clearly erroneous. *Busche* v. *Burkee*, 649 F.2d 509 (7th Cir. 1981). Although juries are thus accorded great discretion in determining the amount of damage awards, damages must be proved; they must not be speculative. *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251 (1946); *Rhoades* v. *Boren*, 486 F.2d 132 (5th Cir. 1973).

Plaintiff has not proven economic damages in an amount which approaches the $220,770 figure which plaintiff's counsel suggested to the jury as his actual damages. Also, the evidence of the comparative fringe benefits was not sufficient to put a dollar value on the loss which plaintiff may have suffered as a result of his working at his present job rather than for General Motors.

Evidence relating to lost wages included the following: plaintiff's 1977 federal tax return; plaintiff's testimony as to his earnings as a General Motors employee and at his present job; plaintiff's testimony concerning fringe benefits he received at General Motors and receives at his present job; plaintiff's testimony that in his current job he receives "comp. time" rather than payment for overtime worked; the testimony of Mr. Bodary that his current base salary is $19,000 annually, with an expected annual income of $33,000, including overtime. Mr. Bodary also testified concerning the fringe benefits he receives.

With so little actual evidence of lost wages before it, the jury was no doubt unduly influenced by the extremely hypo-

thetical figures presented by plaintiff's counsel in closing argument.

General Motors' counsel made no objection to the use of these highly speculative figures. Nor did he attempt, in any detail, to rebut them. In his closing arguments he responded to plaintiff's lost wages estimate by saying "I'm not even going to deal with it. It's preposterous." He suggested that if General Motors did owe plaintiff damages for lost wages the amount should only be based on what he lost up to the time he found new employment. The jury was, in short, given little guidance which would be of aid in reaching a reasonable damage figure for lost wages.

Plaintiff also claimed compensatory damages based on the mental distress which he suffered as a result of being discriminatorily laid off by defendant. In her closing argument plaintiff's counsel stated that plaintiff was seeking $500,000 for mental stress.

Virtually the only evidence of the mental stress which plaintiff suffered as a result of his layoff was plaintiff's brief testimony in this regard. Because of an error for which defendant was not responsible, the Michigan Employment Security Commission denied plaintiff's eligibility to receive unemployment benefits; this error resulted in his not receiving benefits for 13 weeks. Plaintiff, his wife and child went on welfare for approximately seven months. Plaintiff testified that this:

> was a very humiliating type of experience because I had to go and set for hours at the Department of Social Services waiting and their language wasn't the best, as far as my treatment as a human being. I had got one, my car repossessed, which I owed a balance of $2,400 on and paid $5800 for the car, when I bought it. And, I had to go to the Veterans' Service Office because the welfare wasn't really enough to sustain my family and myself.

In *Carey* v. *Piphus*, 435 U.S. 247, 263-64 (1978), an action brought under 42 U.S.C. § 1983, the Supreme Court stated:

> Finally, we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff.[20] In sum, then, although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that *neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.*

---

[20] We use the term "distress" to include mental suffering or emotional anguish. Although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury. . . . (Emphasis supplied.)

This Court has said that "[o]nce a violation of civil rights is found, a plaintiff may recover for out-of-pocket expenses and emotional distress, but there must be sufficient evidence to support such a finding." *Morrow* v. *Igleburger*, 584 F.2d 767, 769 (6th Cir. 1978) *cert. denied*, 439 U.S. 1118, *reh. denied*, 440 U.S. 931 (1979).

Plaintiff's evidence of mental distress is too slight to support a sizeable damages award for the intangible injury of mental harm. While jurors might easily infer that going on welfare and losing one's car would cause emotional distress, plaintiff has not demonstrated his mental distress with the specificity required by *Carey* v. *Piphus*. The jury did not have sufficient evidence to place a high dollar value on plaintiff's emotional harm. *See Woods-Drake* v. *Lundy*, 667 F.2d 1198 (5th

Cir. 1982); *Room* v. *Caribe Hilton Hotel*, 659 F.2d 5 (1st Cir. 1981); *Busch* v. *Burkee*, 649 F.2d 509 (7th Cir. 1981).

It is impossible for the Court to determine what part of the $300,000 award the jury apportioned to each of the two aspects of plaintiff's injuries, lost wages and emotional distress. It is clear, however, that plaintiff's evidence was insufficient to support such a large award in regard to either aspect of his claim for compensatory damages.

The plaintiff sought $500,000 in punitive damages, and the jury awarded him this amount. In *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975) the Supreme Court held that a plaintiff who establishes a cause of action under 42 U.S.C. § 1981 is entitled under certain circumstances to punitive damages.

Defendant asserts that the District Court's instructions on punitive damages amount to plain error, that to justify an award of punitive damages there must be an aggravating element beyond the facts necessary to establish a § 1981 violation. The district court's instructions on punitive damages are based on Fifth Circuit pattern instructions. In its proposed jury instructions, defendant submitted instructions on punitive damages which were more detailed than the rather brief and general Fifth Circuit instructions which the court used. The instructions given were, however, in accord with Restatement 2d of Torts definition of punitive damages (§ 908). *See also Smith* v. *Wade*, 103 S. Ct. 1625 (1983). The instructions of the trial court properly stated that the jury had discretion to impose punitive damages against defendant as punishment for the acts of its agents and for the purpose of deterrence. Statements by the court and by plaintiff's counsel that the financial resources of defendant could be considered in fixing the amount of damages were also proper.

The same standard applies to appellate review for excessiveness of punitive as of compensatory damages: "Whether the award is so high as to shock the judicial conscience and con-

stitute a denial of justice." *Zarcone* v. *Perry*, 572 F.2d 52 (2nd Cir. 1978). Appellate courts can properly reverse the punitive damages award as part of their general supervision of the size of jury verdicts. 6A Moore's Federal Practice ¶ 59.08[6] (2d Ed. 1981).

It is likely that the errors which tainted the compensatory award also affected the jury in its determination of punitive damages. While punitive damages may stand independently of compensatory, here the two are sufficiently interwoven that the interests of justice require that both issues be retried. *See Fury Imports, Inc.* v. *Shakespeare Co.*, 554 F.2d 1376 (5th Cir. 1977). Both punitive and compensatory damages awards are so excessive as to suggest that the verdicts were reached in an improvident manner. *Fountila* v. *Carter*, 571 F.2d 487 (9th Cir. 1978).

Accordingly, we affirm the District Court's judgment on the issue of liability and reverse on the issues of damages. The cause is remanded for trial solely on the issues of compensatory and punitive damages.

APPENDIX "E"

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMMIE J. RODGERS,
Plaintiff-Appellee,

vs. ORDER

FISHER BODY DIVISION,
GENERAL MOTORS CORPORATION,
Defendant-Appellant.

Before: MERRITT and CONTIE, Circuit Judges; and POTTER, District Judge*

No judge of the court having moved for rehearing *en banc,* the petition for rehearing has been referred to the hearing panel for disposition.

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the Court's opinion,

It is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

* The Honorable John W. Potter, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

APPENDIX "F"

SUPREME COURT OF THE UNITED STATES

WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. A-468

SAMMIE J. RODGERS,

Petitioner,

v

FISHER BODY DIVISION,
GENERAL MOTORS CORPORATION,

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 1, 1985.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 18th
day of December, 1984.